82-260

Office - Supreme Court, U.S.
FILED
AUG 13 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-260

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RALPH OGDEN
M. ANNE WILCOX
Attorneys for the Petitioners

WILCOX, OGDEN & DUMOND
1122 Circle Tower Building
5 East Market Street
Indianapolis, Indiana 46204
317-635-8551

August 13, 1982

Central Publishing Company, Inc., Indianapolis, IN 46206

ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that petitioners were not deprived of a constitutionally protected liberty interest without due process of law solely because after the deprivation had been consummated, the state allowed them to bring suit in its courts for redress, or whether the Court of Appeals should have applied the balancing test set forth in *Matthews v. Eldridge* to determine whether due process had been provided.

2. Whether, in light of *Patsy v. Florida Board of Regents*, the Court of Appeals correctly required petitioners to exhaust their state judicial remedies before bringing suit in federal court under 42 U.S.C. §1983.

3. Whether petitioners, as relatives and long-term *de facto* parents of four children, had a constitutionally protected liberty interest in maintaining the integrity of their families.

When this controversy arose, respondent Francis N. Hamilton was judge of the Putnam County, Indiana, Circuit Court; respondent Glenn Deem was Clerk of that court; respondents Cecil Sutton, Helen Hurst, Donald Crosby, Rita Garrett and Janet Lane were members of the Putnam County Board of Public Welfare; and respondents Gerald V. McCord and Juanita Brooks were the director and child welfare worker, respectively, of the Putnam County Department of Public Welfare. Respondents John and Jane A. Doe, John and Jane B. Doe, John and Jane C. Doe, and John and Jane D. Doe were the adoptive parents of the four Ellis children. The district court denied petitioners' motion to amend the complaint to specifically identify and serve the Doe defendants.

TABLE OF CONTENTS

Issues Presented for Review i

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Petition 12

A. The Court of Appeals' Decision Creates a Rigid and Simplistic Rule for Deciding Whether Due Process Has Been Satisfied and is Therefore Contrary to this Court's Holding in *Matthews v. Eldridge* 12

B. The Court of Appeals' Decision Requiring Petitioners To Exhaust Their State Judicial Remedies Conflicts With the Principles of *Patsy v. Florida Board of Regents* 18

C. This Case Presents an Opportunity to Determine Whether Relatives Acting as Long-Term *De Facto* Parents Have a Constitutionally Protected Liberty Interest in Maintaining the Integrity of Their Families 20

Conclusions 26

Appendix

Order of the United States Court of Appeals for The Seventh Circuit Denying Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* A-1

Judgment of the United States Court of Appeals for the Seventh Circuit A-2

Opinion of the United States Court of Appeals for the Seventh Circuit A-3

Judgment of the United States District Court for the Southern District of Indiana A-15

Memorandum Decision of the United States District Court for the Southern District of Indiana.....A-17

TABLE OF AUTHORITIES

CASES

Addington v. Texas, 441 U.S. 418 (1979) 17

Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970) 3

Armstrong v. Manzo, 380 U.S. 545 (1965) 17

Bell v. Burson, 402 U.S. 535 (1971) 16

Caban v. Mohammed, 441 U.S. 380 (1979) 21

Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) . 14

Chaunt v. United States, 364 U.S. 350 (1960) 17

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 20

Commonwealth ex rel. Williams v. Miller, 254 Pa.Super. 277, 385 A.2d 992 (1978) 23

Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977) ..17,21 22,25

Drummond v. Fulton County Department of Family & Children's Services, 563 F.2d 1200 (5th Cir. *en banc* 1977) 23,24,25

Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977) ..13,15 17,18,19,22

Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982) 21

Fuentes v. Sherin, 407 U.S. 67 (1972) 16

Goldberg v. Kelly, 397 U.S. 254 (1970) 14,16

Griswold v. Connecticut, 381 U.S. 479 (1965) 21

Hawkins v. Hawkins, 102 Ill.App.3d 1037, 430 N.E.2d 652 (1981) 23

Haygood v. Younger, 527 F.Supp. 808 (E.D. Cal. 1981) (Appeal pending, No. 824,285, 9th Cir.) 18

In re Winship, 397 U.S. 358 (1970) 17
In The Interest of J. R., 315 N.W.2d 750 (Iowa 1982) 23
Ingraham v. Wright, 430 U.S. 651 (1977)..... 12,13,14,18
Jech v. Burch, 466 F.Supp. 714 (D.Hawaii 1979) 21
Johnson v. Fallon, 181 Cal.Rptr. 414 (Cal.App. 1982)... 23
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring) ... 14
Keyees v. Tippecanoe County Department of Public Welfare, 600 F.2d 693 (7th Cir. 1979) 24,25
Krieg v. Glassburn, ___ Ind.App. ___, 419 N.E.2d 1015 (1981) (Tr. denied) 23
Looper v. McManus, 581 P.2d. 487 (Okl.App. 1978) 23
Matthews v. Eldridge, 424 U.S. 319 (1976) ... 12,13,14,25
McDonald v. State, 172 Ind. 393, 88 N.E. 673 (1909) ... 9
Meyer v. Nebraska, 262 U.S. 390 (1923) 21
Monroe v. Pape, 365 U.S. 167 (1961)..... 20
Moore v. City of East Cleveland, 431 U.S. 494 (1977).....20,22,25
Morrissey v. Brewer, 408 U.S. 471 (1972) 14
O'Brien v. Tilson, 523 F.Supp. 494 (E.D.N.C. 1981) 21
Parratt v. Taylor, 451 U.S. 527 (1981) 12,13,14,18
Patsy v. Florida Board of Regents, ___ U.S. ___ (No. 80-1874, decided June 21, 1982)..... 20
People v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981) 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925).....21,22
Pollar v. Columbia Broadcasting Company, 368 U.S. 464 (1962) 3

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 20

Rivera v. Marcus, 533 F.Supp. 203 (D.Conn. 1982).. 25

Roe v. Conn, 417 F.Supp. 769 (M.D.Ala. 1976)... 15,17, 18,21

Sims v. State Department of Public Welfare, 438 F.Supp. 1179 (S.D. Tex. 1977) (three judge court), *rev'd. on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979)..... 15,17,18,21

Santosky v. Kramer, ___ U.S. ___ (No. 80-5889, decided March 24, 1982).....17,21

Sherrard v. Owens, 484 F.Supp. 728 (W.D.Mich. 1980), *aff'd.*, 644 F.2d 542 (6th Cir. 1981), *cert. denied*, ___ U.S. ___ (1981) 24,25

Smith v. Organization of Foster Families For Equality and Reform 431 U.S. 816 (1977)..... 16,21,23,25

Speiser v. Randall, 357 U.S. 513 (1958)..... 17

Stanley v. Illinois, 405 U.S. 645 (1972).... 13,14,17,18,21

Stout v. Tippecanoe County Department of Public Welfare, ___ Ind. App. ___, 395 N.E.2d 444 (1979) 10

Wakinekona v. Olim, 664 F.2d. 708 (9th Cir. 1981), *cert. granted*, No. 81-1581 (June 1, 1982) 19

Wilson v. Family Services Division, 554 P.2d. 227 (Utah 1976)..... 22

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 21

Woodby v. Immigration & Naturalization Service, 385 U.S. 276 (1966) 17

STATUTES CONSTRUED

Ark. Stat. Ann. §34-1211.1 23
Conn.Gen.Stat.Ann. §46b-59 23
Fla. Stat.Ann. §61-13(2)(b) 23
Ga.Code Ann. §19-7-3 (1981) 23
Ind. Code §31-1-11.7 23
Iowa Code Ann. §598.35 23
Mo.Ann.Stat. §452.400 (Vernon) 23
Mont.Stat.Ann. §40-9-102 23
Nev.Stat.Ann. §123.123 23
N.J.Stat.Ann. §9:2-7.1 23
N.M.Stat.Ann. §40-9-1 23
N.C.Gen.Stat. §50-13.5(j) 23
Ohio Stat.Ann. §3109.05 23
Utah Code Ann. §30-5-1 23
Va.Code §20-107.2 23
Wash.Rev.Code Ann. §26.09.240 23
W.Va.Code §48-2-15 23
Wis.Stat.Ann. §767.245(4) 23

RULES OF COURT

Indiana Trial Rule 81 9

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMY FRANCES ELLIS, CYRIL VICTOR FRAZIER, AND ZELLA FERN FRAZIER,
Petitioners,

v.

JUDGE OF THE PUTNAM CIRCUIT COURT, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Amy Frances Ellis, Cyril Victor Frazier, and Zella Fern Frazier respectfully petition the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on February 1, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 569 F.2d 510 and is set out in the Appendix at pages A-3 through A-15. The judgment of the Court of Appeals appears at page A-2.

The order of the Court of Appeals denying petitioners' request for rehearing and suggestion for rehearing *en banc* appears at page A-1.

The judgment and memorandum decision of the United States District Court for the Southern District of Indiana, Indianapolis Division, is unreported. It appears at pages A-15 through A-25.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit were entered on February 1, 1982. On March 31, 1982, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc*.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This petition is timely filed pursuant to the June 3, 1982, order of Justice John Paul Stevens, granting an enlargement of time under Supreme Court Rule 22, up to and including August 15, 1982.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution reads, in pertinent part:

> "Congress shall make no law . . . abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[1]

The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343, to secure redress for the deprivation of petitioners' rights under the First, Ninth, and Fourteenth Amendments to the United States Constitution.

This case concerns the four young children of Larry and Mary Ellis: Twila, Kimberly, Larry Jr., and Delta Dawn.

When the controversy arose in July of 1977, petitioner Amy Frances Ellis had custody of Twila and Delta Dawn. Petitioners Cyril and Zella Frazier, who are husband and wife, had custody of Kimberly and Larry Jr. (R.P. 209)

Amy Ellis is the sister of Zella Frazier, who is Larry's biological mother and adoptive aunt. Although Mrs. Ellis adopted Larry from Mrs. Frazier in 1952, Larry maintained close contact with Mrs. Frazier throughout his life and voluntarily placed two of his children with her on numerous occasions. Welfare records refer to Mrs. Frazier as the children's "grandmother".

The children had resided with petitioners for extended periods since they were born. It is undisputed that petitioners had developed close emotional ties with the children and provided them with good homes. (R.P. 110; Page 8 of Plaintiffs' Exhibit No. 2; R.P. 207-208; R.P. 236-253)

[1]Since the District Court decided the case on respondents' motion for summary judgment, the facts are presented in the light most favorable to the petitioners. *Adickes v. S.H. Kress & Company*, 398 U.S. 144 (1970); *Pollar v. Columbia Broadcasting Company*, 368 U.S. 464, 473 (1962).

In March of 1976, all four children were made wards of the Putnam County Department of Public Welfare and placed in foster care, primarily as a result of Mrs. Ellis' report that Larry and his wife were mistreating them. (R.P. 111-112) Although the wardships were not terminated, the children were returned to their parents three months later. During the next year, the children frequently resided with petitioners. (R.P. 209)

Larry had custody of the children in July of 1977 when he requested permission from the welfare department to place Twila and Delta Dawn with Mrs. Ellis and to place Kimberly and Larry Jr. with the Fraziers. Welfare granted this request and acknowledged in writing that petitioners were to continue caring for the children until Larry made other arrangements. (R.P. 209; 215-216)

Petitioners understood from Larry and from Larry's written agreement with welfare that the children would remain with them on a permanent basis, and wanted them to do so. (R.P. 207-208; R.P. 236-253) The children shared this desire. (R.P. 256-257)

One month later, Mrs. Ellis and the Fraziers each received letters demanding that the children be returned to the welfare department within two days so they could be placed in foster homes. (R.P. 210) There is no evidence that petitioners were not properly caring for the children, or that any emergency existed which required the children's removal. Indeed, no explanation has *ever* been offered for this decision. Neither Mrs. Ellis nor the Fraziers were informed that they had a right to a hearing or to continued custody of the children. Mrs. Ellis was told only that the children were being removed immediately and that she had no choice but to surrender them. The letter was followed by telephone calls the next day. Although Mrs. Ellis and the Fraziers protested the removal, they surrendered the children as ordered. (R.P. 210)

This was the last written communication petitioners ever received about respondents' plans for the children. During the next ten months, when petitioners requested further information, respondents refused to discuss the matter.

After the children were removed, they were sent to a group home in another county.[2] Shortly thereafter, Mrs. Ellis called respondent Brooks about visitation and was told that there was a six-week waiting period. No explanation was offered for this waiting period and no authority for the existence of such a rule was given. Petitioners saw the children in September, October, and November. Before each visit, Mrs. Ellis called Ms. Brooks to make the appointment and asked that the children be returned. Ms. Brooks denied their requests and refused to discuss the matter. (R.P. 211)

Carol Tewksbury is an investigator who interviewed Larry and Joann Willis,[3] two staff members from the group home.

According to the Willises, Twila, Delta Dawn, and Kimberly were placed with them while Larry Jr. was sent to another cottage. When Ms. Brooks delivered the children, she said that the children had been living with their grandparents, who were fine people, and that the children had been well cared for. Ms. Brooks said that these children were an "unusual" case. (R.P. 255)

The children were extremely upset because they had been taken from their grandparents and Kim sobbed much of the time. Mrs. Willis watched the girls become more and more unhappy while they were at the home. She said that

---

[2]There is evidence that at least some of the children were sexually molested at the home. (R.P. 257-258)

[3]Affidavits were not available from these persons, in that they had terminated their employment and their whereabouts were unknown. (R.P. 254)

they expressed only love for their grandparents and that when they said their prayers they would ask to go home to their grandparents. (R.P. 256)

Twila and Kim eagerly awaited their grandparents' visits. On the first visit Kim begged her grandparents not to leave, and both girls were always extremely sad when they did. The children received frequent letters from the Fraziers, which were opened by the home before delivery. (R.P. 257)

Twila was removed from the home on December 13, 1977, and petitioners have had no contact with her since that date. The welfare department refused to tell petitioners where she was placed and denied them any opportunity to contact her.

Kimberly was removed on December 21, 1977, and petitioners were not told where she was or permitted to contact her until shortly before oral argument in the Court of Appeals.[4] (R.P. 212)

Petitioners continued visiting Delta Dawn and Larry Jr. at the group home between January and March of 1978. In April the children were relocated and the welfare department refused to tell petitioners where they were placed. Petitioners have had no contact with either child since that date. (R.P. 212-213)

After Twila and Kimberly had been removed from the home, petitioners wrote them every week, but were required to take their letters to Ms. Brooks' office unsealed.

[4]The Court of Appeals allowed petitioners to supplement the record on appeal by showing that Kimberly had been removed from her current adoptive parents and placed in a group home because the adoptive parents were abusing her. The Hon. William C. Vaughn, III, Judge Hamilton's successor, allowed the Fraziers to intervene in the neglect action and granted them limited visitation rights.

The children, however, were not allowed to write back. On April 3rd, Ms. Brooks stated, without explanation, that petitioners could no longer write to the children. (R.P. 213)

Judith Kirtland, Esq., began representing petitioners in May of 1978,[5] and went to Ms. Brooks' office to ask about the children. Ms. Brooks took Ms. Kirtland to see Judge Hamilton, who stated that the children had been removed because the petitioners did not want them. (R.P. 170-171)

When Ms. Kirtland told Judge Hamilton that petitioners wanted custody of their grandchildren, Judge Hamilton "informed me that he knew what was best for the children of Putnam County, that he did not like outsiders coming in and telling him or his welfare department what should be done with children in Putnam County, and that he would not approve any legal efforts by my clients to regain the care and custody the children". Judge Hamilton further stated that if petitioners did not cease trying to regain the children, he would have them adopted by persons living far away. (R.P. 170-171)

Thereafter, Ms. Kirtland prepared petitioners' pleading to adopt the children and presented it to respondent Deem, the Clerk of the Putnam Circuit Court, along with a check for the filing fee. Deem stated that all adoption petitions were filed with the judge and refused to accept it. Ms. Kirtland went to Judge Hamilton's office and gave the petition to his secretary. The secretary file-marked it and assigned a cause number. (R.P. 170, 176-178)

She then took it into the judge's office, returned, and informed Ms. Kirtland that she had been instructed not to accept it because "a single petition incorporated the

[5]Ms. Kirtland is an Indianapolis attorney who works with the Indiana Civil Liberties Union. Petitioners began seeking legal advice early in 1978, but could not find an attorney in Putnam County who would take their case.

pleadings regarding all four children". She stated that Judge Hamilton wanted a separate petition for each child, but referred to no other defects. (R.P. 171)

The judge's secretary opened a file drawer and showed Ms. Kirtland petitions from other cases. One of these was a single petition seeking the adoption of more than one child, which was "hurriedly" returned to the file folder. Ms. Kirtland was allowed to examine several other petitions to determine the nature of the allegations which they contained. None contained the allegations which Judge Hamilton later required Ms. Kirtland to include in the petitions for the Ellis children. (R.P. 171)

Ms. Kirtland prepared four separate adoption petitions, one for each child, and returned them to Judge Hamilton along with a check for the filing fee. (R.P. 171-172, 180-189) Thereafter, he wrote and demanded that she redraft the petitions to include all of the information required on the State Board of Health birth certificate form.[6] Although the letter was dated July 25th, Ms. Kirtland did not receive it until the second week in August because it had been mailed in an envelope with insufficient postage. (R.P. 172, 190-193)

On August 24th, Ms. Kirtland sent a third set of petitions to Judge Hamilton along with a check for the filing fee. (R.P. 194-204)

On August 28th, Judge Hamilton wrote Ms. Kirtland, acknowledged receipt of the petitions, and returned them without action because the Ellis children had been adopted by other persons. (R.P. 172-173, 205-206) Larry was adopted on August 11th, Delta Dawn on August 15th,

---

[6]There is no statutory, common law or administrative authority requiring this information in the petition, and other Indiana courts allow the birth certificate form to be completed after the adoptions are granted. (R.P. 263-264)

Kimberly on August 22nd, and Twila on August 25th. (R.P. 115-116) Each child was adopted by a different couple after Ms. Kirtland attempted to file petitioners' first pleading on July 18th. (R.P. 130-150) Neither petitioners nor their attorney had notice that these other adoption petitions were pending.

These facts show that Judge Hamilton deliberately refused to accept petitioners' adoption pleadings because he and respondent Brooks wanted more time to find other adoptive parents and that neither he nor the welfare department intended to consider petitioners' adoption pleadings on their merits.[7]

In his affidavit in support of summary judgment, Judge Hamilton stated that the petitioners' first petition was "deficient in many ways and did not comply with the rules of this court nor in my opinion, with the laws of the State of Indiana" and that Ms. Kirtland's attempts to file the petition with the clerk violated a long-standing rule of court which required that adoption petitions be filed with the court reporter. (R.P. 114-116)

Judge Hamilton's attorney acknowledged that these local rules were not written (R.P. 153-154), and oral rules of court have no legal significance under Indiana law. *McDonald v. State*, 172 Ind. 393, 88 N.E. 673 (1909); *Indiana Trial Rule* 81.

In response to Judge Hamilton's allegations, Ralph Ogden, Esq., filed an affidavit stating that he had helped draft Indiana's current juvenile and paternity laws, and

---

[7]It is significant that in their affidavits in support of summary judgment, respondents neither explained nor attempted to justify what they had done. They did not even state that they were acting in the children's best interests. Since they refused to comply with petitioners' repeated discovery requests, it can only be inferred from their silence that they had no good reason at all.

that he was the staff attorney for an interim study committee of the Indiana General Assembly which was redrafting the adoption statutes. In his private practice, Mr. Ogden handled a variety of adoption matters before the Marion County and other state courts, and was familiar with the procedures and practices of those courts. (R.P. 261-263)

Copies of two adoption petitions, one filed in the Marion County Superior Court, and one filed in the Knox County Circuit Court, were attached to his affidavit. Both petitions had been approved by the courts in which they were filed. Neither contained the information which Judge Hamilton required Ms. Kirtland to include, and one of them involved three siblings who were wards of the welfare department. It had no consents attached or referenced. (R.P. 263; 265-271)

After learning that the children had been adopted by strangers, petitioners filed their complaint in the district court and sought injunctive relief and monetary damages under 42 U.S.C. §1983. (R.P. 6-11)

Petitioners sought injunctive relief against all of the defendants to set aside the adoptions, to set aside any other court actions which had separated petitioners from their grandchildren, to prevent further interference with petitioners' family lives, and to secure immediate visitation with the children.[8]

Petitioners demanded monetary damages from each of the welfare defendants for their unconstitutional

---

[8]At the hearing on summary judgment, petitioners dismissed their claim to have the adoptions set aside because they believed it would do the children more harm than good to separate them from their new parents after so much time had passed. *See, Stout v. Tippecanoe County Department of Public Welfare*, ___ Ind. App. ___, 395 N.E.2d 444, 453, n. 14 (1979).

intrusions into their family lives and for destruction of their relationships with their grandchildren. They also demanded monetary damages from the Clerk of the Putnam Circuit Court for refusing to file their adoption petitions, thereby denying them access to state courts.

In November of 1979, at the court's request, respondents moved for summary judgment. (R.P. 102, 104) This motion was granted on December 19, 1980, when judgment was entered against all of the plaintiffs on all of the claims in their complaint. The court also filed a memorandum which included findings of fact and a discussion of the law which it deemed controlling. (R.P. 276-285; Appendix, pages A-15 through A-25)

The district court failed to address the events which led up to the children's adoptions, and concluded in general terms that petitioners should have appealed Judge Hamilton's various decisions, that the decisions of Judge Hamilton and the welfare department were lawful, and that petitioners' relationships with their grandchildren were legally and forever severed by the children's adoptions.

This decision was appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed the judgment of the district court on February 1, 1982. (Appendix, pages A-3 through A-14)

Petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc* which was denied on March 31st, and this petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Decision Creates a Rigid and Simplistic Rule for Deciding Whether Due Process Has Been Satisfied and is Therefore Contrary to this Court's Holding in *Matthews v. Eldridge*

The Court of Appeals held that due process was satisfied solely because Indiana allowed petitioners to bring suit in its courts to remedy a constitutional deprivation already committed by respondents. Certiorari should be granted because this ruling is contrary to controlling precedent of this Court and because it conflicts with decisions of other federal courts of appeal in the following respects:

1. It replaces the three part balancing test of *Matthews v. Eldridge*, 424 U.S. 319 (1976) with a simplistic approach which considers only one factor: whether a citizen was allowed to bring suit in state court to remedy the wrong.

2. It eliminates the requirement for a pre-deprivation hearing initiated by the government.

3. It eliminates the fundamental requirement that the government give notice to the citizen against whom it proposes to act.

4. It shifts the burden of persuasion from the state to its citizens, *e.g.*, it requires the citizen to prove that the government's actions were impermissible, rather than requiring the government to show that its conduct is proper in the first instance.

The Seventh Circuit relied upon the conclusions reached in *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977), for the proposition that due process was satisfied whenever the state allowed its citizens to sue in its courts for the redress of constitutional

wrongs committed by state officials.[9] In focusing exclusively upon this one issue to determine whether due process has been provided, the court adopted an inflexible rule which obviates the need for the balancing test articulated in *Matthews v. Eldridge, supra.*

Under this test, the factors which must be weighed and balanced in determining whether due process has been satisfied are:

---

[9]*Parratt* and *Ingraham* are distinguishable on five grounds: (1) Here, there is no difficulty in predicting that removing children from their homes, terminating contact between them and their families, and erecting permanent barriers to reuniting the families will *invariably* result in serious constitutional deprivations. "[T]he 'fact-specific' nature of the determination presents a grave risk of erroneous deprivation" by giving welfare workers unbridled discretion to act without proper review. *Duchesne v. Sugarman*, 566 F.2d 817, 828, n. 26 (2nd Cir. 1977) In *Parratt* and *Ingraham*, the deprivation was *not* predictable. (2) It was not "impracticable" to hold a pre-deprivation in this case, as it was in both *Parratt* and *Ingraham*. Indeed, the cost and administrative burden here would not be significantly different regardless of when the hearing was held. The hearing is likewise practicable because the government's intrusion into a constitutionally protected area was planned in advance. Neither negligence of prison officials nor the use of excessive punishment on school children is "planned" in the same sense. (3) The rights considered in *Parratt* and *Ingraham* are qualitatively different from those asserted here. (4) Even if post-deprivation remedies here could restore the status quo, something which petitioners vigorously denied in the Court of Appeals, any delay between the commission of the wrong and undoing it caused petitioners to suffer irreparably from being deprived of their grandchildren and caused the grandchildren to suffer irreparably from the uncertainty and dislocation. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972). These psychic injuries cannot be undone by the stroke of a judicial pen which returns the children long after they were removed, and they cannot be adequately paid for with money. (5) After considering the factors specified in *Matthews v. Eldridge, supra*, the Court held in *Parratt* and *Ingraham* that state *tort* remedies were all the process that was due. There was a general concern in both cases that federal courts were becoming "small claims" courts and that 42 U.S.C. §1983 was being converted into a substitute for state tort actions. Neither danger is present in this case.

"...first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 424 U.S. 334-335.

The same analysis was employed by this Court long before *Matthews* was decided. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). It has also been applied in every due process case considered by the Court since *Matthews*, including *Parratt v. Taylor*, and *Ingraham v. Wright*, *supra*.

The balancing test is necessary because "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, *supra*, 367 U.S. at 895, and because due process is a flexible process which "[c]alls for such procedural protection as the particular situation demands", *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It represents "a profound attitude of fairness between man and man and more particularly, between the individual and government." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 162-163 (1951) (Frankfurter J., concurring)

Stanley v. Illinois, *supra*, held that "...all Illinois parents are constitutionally entitled to a hearing on their fitness *before* their children are removed from their custody." *Id.* at 405 U.S. 658 (emphasis added). The Court of Appeals' holding that due process is satisfied even though the children are removed *without* a hearing directly conflicts with this Court's holding in *Stanley*.

It is also in sharp conflict with the Second Circuit's decision in *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977), which is identical to the case at bar in all essential factual particulars except that it was brought by the children's mother. *Duchesne* held that

> "...the state cannot constitutionally sit back and wait for the parent to institute judicial proceedings. It cannot...[adopt] for itself an attitude of 'if your don't like it, sue.' *Kimbrough v. O'Neil*, 523 F.2d 1057, 1060, n. 3 (7th Cir. 1975) (Swygert, J., concurring) The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uniformed in legal intricacies may allow to go unchallenged for a long period of time. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 83 n. 13, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 385, n. 4 (2d Cir. 1973) (Timbers, J., concurring) Nowhere is the inadequacy of the state's approach more poignantly demonstrated than in the present case where the mother did not obtain legal advice until....some 27 months after the initial removal of the children, her rights and those of her children to live together as a family were denied with impunity. Therefore, we must conclude that the failure of appellees to obtain judicial ratification of their decision to maintain custody of the children, despite the numerous and vociferous requests of Ms. Perez for their return, constituted a violation of due process." (Footnote omitted) *Id.* at 566 F.2d 828.

Accord: *Roe v. Conn*, 417 F.Supp. 769 (M.D.Ala. 1976); *Sims v. State Department of Public Welfare*, 438 F.Supp.

1179 (S.D.Tex. 1977) (three judge court), *rev'd. on other grounds sub nom. Moore v. Sims*, 442 U.S. 415 (1979). *See, also, Bell v. Burson*, 402 U.S. 535 (1971); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly, supra.*

Respondents' only communication with petitioners regarding removal of the children was their abrupt letter of August 16, 1977, which demanded that petitioners surrender the children on August 19th.[10]

It cannot be seriously argued that this gave petitioners the constitutionally required notice of the state's plans to permanently remove the children and sever all contact between them and petitioners. Indeed, in light of respondents' letter to the children's father one month earlier, in which they promised to leave the children with petitioners until *he* made other arrangements, the removal was at best an ambiguous gesture.

Because the Court of Appeals did not consider the absence of notice to the petitioners, the practical effect of its ruling is to give judicial sanction to summary governmental action and the elimination of the notice requirement in every instance.

Every state, including Indiana, requires its welfare authorities to prove parental unfitness before removing a child.[11] This rule is consistent with our common law

---

[10]The entire text of the letter is: "Have the Ellis children in the office of the Department of Public Welfare on the morning of 8-19-77 so they may be placed in homes. Do nothing to upset them in the meantime." (Exhibit "A" to Affidavit of Zella Fern Frazier In Opposition to Summary Judgment)

[11]Many states, including Indiana, also require welfare authorities to show that removal is the least restrictive alternative consistent with protection of the child; none allow removal simply because someone else would make a better parent. *Cf. Smith v. Organization of Foster Families for Equality and Reform* ("OFFER"), 431 U.S. 816, 863 (1977) (concurring opinion of Stewart, J.) In the case at bar, respondents have

(Footnote continued on following page)

tradition and with constitutional mandate. *Speiser v. Randall*, 357 U.S. 513 (1958); *Stanley v. Illinois*, *supra*; *Duchesne v. Sugarman*, *supra*; *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977); *Roe v. Conn*, *supra*; and *Sims v. Texas Department of Public Welfare*, *supra*. *See, also, Santosky v. Kramer*, ___ U.S. ___ (No. 80-5889, decided March 24, 1982); *Addington v. Texas*, 441 U.S. 418 (1979); *In re Winship*, 397 U.S. 358 (1970); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276 (1966); and *Chaunt v. United States*, 364 U.S. 350 (1960).

Nonetheless, the Court of Appeals allowed respondents to shift the burden of proof to petitioners by acting summarily in the first instance and requiring petitioners to bring suit to set aside their unconstitutional intrusion into petitioners' family lives. As plaintiffs in state court, petitioners would have had the burden of proving that the state acted improperly, even though the burden of justifying their conduct would have rested with the welfare authorities had a hearing been held at the state's instigation before the deprivation.

The Seventh Circuit thus gave judicial approval for the government to summarily remove children without notice or hearing, and rewarded such gross misconduct by allowing the improper removal to shift the burden of persuasion. *Armstrong v. Manzo*, 380 U.S. 545 (1965), the authorities cited above, and fundamental fairness prohibit such a result.

---

never argued that petitioners were unfit to have custody of the children; indeed the record shows that such an allegation could not have been proven because it simply wasn't true. If the petitioners were fit parents, as the record shows, welfare's interest in caring for their children is *de minimus* and welfare "spites its own articulated goals" by removing them. *Stanley v. Illinois*, *supra*, at 405 U.S. 652, [illegible]9.

B. The Court of Appeals' Decision Requiring Petitioners To Exhaust Their State Judicial Remedies Conflicts with the Principals of *Patsy v. Florida Board of Regents*

Petitioners were deprived of a constitutionally protected liberty interest when respondents summarily removed the children without notice or hearing. Because there were no exigent circumstances which would justify a summary removal, the deprivation was accomplished without affording petitioners due process of Law.[12] Petitioners and the children suffered irreparable harm the moment the children were removed, and that harm continues for as long as they remain separated. *Stanley v. Illinois, supra.* Any action which petitioners took after the removal could only have been in the form of a *remedy*: it was not a substitute for the process due them prior to the deprivation, it could not undo the wrong, and it could never adequately compensate them or the children for what was done. *Stanley v. Illinois, supra; Duchesne v. Sugarman, supra.*

By thus requiring petitioners to pursue a *remedy* in state courts, the Seventh Circuit required petitioners to exhaust their state remedies.

At least two other federal courts have addressed the exhaustion question in this same context, and are in sharp disagreement with the Seventh Circuit. See, *Haygood v. Younger*, 527 F.Supp. 808, at 813-815 (E.D. Cal. 1981)

---

[12]In both *Ingraham* and *Parratt, supra*, the common law tort remedy was all the process that was due. However, where state officials seek to remove children from long-term *de facto* parents, who are wholly suitable custodians and who are joined to the children by mutually strong emotional ties, a post-removal hearing, at the parents' instigation, is surely not all that due process requires. *See, e.g., Stanley v. Illinois; Duchesne v. Sugarman; Roe v. Conn*, and *Sims v. State Department of Public Welfare, supra. See also*, Justice Blackmun's concurring opinion in *Parratt*, at 451 U.S. 545.

(appeal pending, No. 824,285, 9th Cir.) and *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981), *cert. granted*, No. 81-1581, June 1, 1982, where Judge Canby noted:

> "It is true that there is general language in the majority opinion in *Parratt* suggesting that where a deprivation occurs because a state fails to follow its procedure rather than because it follows its procedure, and there is a state court remedy, then the state has provided all the process that is due. 101S.Ct. at 1917. But this statement must be read in the context in which it was made, that of a tortious deprivation of property for which the state provides a tort remedy. A broader reading that would apply to the present case would remit all §1983 cases to state courts whenever the conduct complained of violated state law as well as the federal Constitution. The result would be to read into §1983 a requirement of exhaustion that has consistently been rejected by the federal courts.[1] *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 481, 5 L.Ed.2d 492 (1961); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979), *cert. denied*, 445 U.S. 962, 100 S.Ct. 1648, 64 L.Ed.2d 237 (1980); *Canton v. Spokane School District*, 498 F.2d 840 (9th Cir. 1974).
>
> "1. It is also clear that *Parratt* cannot be read as holding that a state court remedy for a violation of the fourteenth amendment itself provides all the process that is due. The problems with such a circular proposition are insurmountable. Section 1983 actions may be brought in state court. *Martinez v. California*, 444 U.S. 277, 283-84, n.7, 100 S.Ct. 553, 558, n.7, 62 L.Ed.2d. 481 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1., 100 S.Ct. 2502, 2503 n.1, 65 L.Ed.2d 555 (1980). State courts are obligated to enforce applicable federal law. U.S. Const. art. VI, cl. 2. By entertaining §1983 actions, a state court consequently provides a remedy for state deprivation of any federal right. To say that such a remedy provides all the process that is

due from a state would be to deprive the federal courts of primary enforcement of federal rights. *Parratt* of course evinces no such intention." *Id.* at 664 F.2d 714-715.

Exhaustion is contrary to the express holding in *Patsy v. Florida Board of Regents*, ___ U.S. ___ (No. 80-1874, decided June 24, 1982), which reaffirmed the holding of *Monroe v. Pape*, 365 U.S. 167 (1961), that:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought to and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court." *Id.* at 365 U.S. 183

The decision of the Court of Appeals conflicts with this non-exhaustion rule, and should be reversed.

C. This Case Presents an Opportunity to Determine Whether Relatives Acting as Long-Term *De Facto* Parents Have a Constitutionally Protected Liberty Interest in Maintaining the Integrity of Their Families

This Court has long recognized that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 539-640 (1974). There is a "private realm of family life which the state cannot enter" *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), and the Constitution "...protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494 at 504-505 (1977) (plurality

opinion). *And see, Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois; Smith v. OFFER;* and *Santosky v. Kramer; supra.*[13]

Neither this Court nor the lower federal courts have articulated precise definitions of "family" or "parent".[14] It is clear that married parents and their children constitute a family and are entitled to the full panopoly of procedural and substantative due process protections against state interference. *Meyer v. Nebraska; Pierce v. Society of Sisters, Prince v. Massachusetts;* and *Smith v. OFFER, supra.* The same is true for parents of "illegitimate" children. *Stanley v. Illinois, supra; Caban v. Mohammed*, 441 U.S. 380 (1979).

The question presented by this case is whether relatives acting as long-term *de facto* parents with consent of the natural parents have the same or similar constitutional rights as the natural parents.[15] In *Smith v. OFFER, supra,*

---

[13]Lower federal courts have also applied these principles to a variety of situations involving family life and childrearing. *See, generally, Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977); *Jech v. Burch*, 466 F.Supp. 714 (D.Hawaii 1979); *O'Brien v. Tilson*, 523 F.Supp. 494 (E.D.N.C. 1981); *Roe v. Conn, supra; Sims v. State Department of Public Welfare, supra; Drollinger v. Milligan, supra.*

[14]The Court of Appeals noted a lack of precedent to provide guidance on this point. See Appendix at page A-9; *Ellis v. Hamilton*, 669 F.2d 510, at 513 (7th Cir. 1982).

[15]Because it found that there had been no denial of due process under any circumstances, the Court of Appeals did not address the question. The court noted, however, that at least as to Mrs. Ellis, it would be "reluctant to conclude that a great-aunt, an adoptive grandmother, and a *de facto* mother and father all rolled up into one does not have a liberty interest sufficiently like a parent to support an action under Section 1983." Appendix at page A-9; 669 F.2d at 513.

the Court noted that "The scope of these rights extends beyond natural parents. The 'parent' in *Prince* itself, for example, was the child's aunt and legal custodian." *Id.* at 431 U.S. 843, n. 49. Likewise, in *Pierce v. Society of Sisters, supra*, at 268 U.S. 534-535, the court referred to "the liberty of parents *and guardians* to direct the upbringing and education of children under their control." (emphasis added)

The plurality opinion by Justice Powell in *Moore v. City of East Cleveland, supra*, discusses the importance of extended family members in caring for children when parents are unable to do so, and notes that "...unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 431 U.S. 501. That family choice was the decision of a grandmother to live with and care for her grandchild.

And in *Drollinger v. Milligan, supra*, the court held that "The nuclear family has traditionally constituted the unit afforded the protection of due process. We see no reason, however, not to extend this guaranty to the grandfather-grandchild relationship." *Id.* at 552 F.2d 1227.

Petitioners have found no contrary authority in the federal decisions.[16]

---

[16]At least one state court has held that because "...recognition of family relationships and reciprocal interests and responsibilities is so interwoven in the fabric of the law...next of kin, such as this grandmother, do have some dormant or inchoate right or interest in the custody and welfare of children who become parentless." *Wilson v. Family Services Division*, 554 P.2d 227 (Utah 1976). By statute or judicial decision, nearly all of the fifty states allow grandparents to petition for visitation even after the parents have been separated by

(Footnote continued on following page)

This Court has also implied the existence of a liberty interest in foster family relationships. *Smith v. OFFER, supra*, noted that:

> "No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals." (footnotes omitted) *Id.* at 431 U.S. 844.

Drummond v. Fulton County Department of Family & Children's Services, 503 F2d. 1200 (5th Cir. *en banc* 1977), held that because foster care relationships created by the state were understood by the foster parents to be temporary, and because they could, under state law, be

---

divorce. For representative cases and statutes, see *In the Interest of J. R.*, 315 N.W.2d 750 (Iowa 1982) (grandparents have statutory right to intervene in termination proceedings); *Iowa Code Ann.* §598.35; *People v. Sheppard*, 54 N.Y.2d 320, 429 N.E.2d 1049 (1981) (grandparent has right to visit with grandchild even after grandchild has been adopted); *Johnson v. Fallon*, 181 Cal.Rptr. 414 (Cal.App. 1982) (grandparents have visitation rights even after adoption); *Hawkins v. Hawkins*, 102 Ill.App. 3d 1037, 430 N.E.2d 652 (1981) (grandparents have right to petition for visitation); *Looper v. McManus*, 581 P.2d 487 (Okl.App. 1978); *Commonwealth ex rel. Williams v. Miller*, 254 Pa. Super. 227, 385 A.2d 992 (1978); *Krieg v. Glassburn*, ___ Ind.App. ___, 419 N.E.2d 1015 (1981) (Tr. denied); *Ind. Code* §31-1-11.7; *Conn.Gen.Stat.Ann.* §46b-59; *Fla.Stat.Ann.* §61-13(2)(b); *Mo.Ann.Stat.* §452.400 (Vernon); *Wash.Rev.Code Ann.* §26.09.240; *Wis.Stat.Ann.* §767.245 (4); *Ohio Stat.Ann.* §3109.05; *Ga. Code Ann.* §38-129; *N.J.Stat.Ann.* §9:2-7.1; *N.C.Gen.Stat.* §50-13.5(j); *Utah Code Ann.* §30-5-1; *Ark.Stat.Ann.* §34-1211.1; *Nev.Stat.Ann.* §123.123; *N.M.Stat.Ann.* §40-9-1; *Va.Code* §20-107.2; *W.Va.Code* §48-2-15; *Mont.Stat.Ann.* §40-9-102.

terminated at will, the foster parents had no liberty interest in continued custody. The court was careful to note that its "conclusion does not necessarily control every 'foster family' situation, but only those in which a child placement agency charged with custody of a child places that child for temporary care. Other situations will have to be addressed on a case by case basis." *Id.* at 563 F.2d 1207.

In *Keyees v. Tippecanoe County Department of Public Welfare*, 600 F.2d 693 (7th Cir. 1979), the Seventh Circuit adopted the Fifth Circuit's reasoning in *Drummond*, but noted that "certainly, where a biological relationship exists, the power of the state to regulate activity is limited." *Id.* at 600 F.2d 697. *Accord: Sherrard v. Owens*, 484 F.Supp. 728 (W.D.Mich. 1980), *aff'd.*, 644 F.2d 542 *(6th Cir. 1981), cert. denied*, ___ U.S. ___ (1981).

Petitioners differ from the foster parents in these cases in four respects: (1) Petitioners are related to the children and the children's parents by both blood and adoption, and in the case of Mr. Frazier, by marriage; (2) Petitioners' strong emotional ties and close-knit family relationships with the children arose out of these blood and adoptive relationships, and not out of any agreement with the state. Indeed, petitioners were important figures in the children's lives for nine years before the welfare department intruded. (3) Because petitioners were caring for the children with the express consent of the children's parents, there was no tension between their claims and the claims of the parents;[17] and (4) Petitioners had every expectation that their custodial relationships with the

[17]Nor was there any tension between petitioners' claims and the interests of the children. It is undisputed that petitioners were providing the children with good homes, that strong bonds of mutual affection existed between petitioners and the children, and that the children suffered grievously from the separation.

children would continue as long as they provided them with good homes.[18]

In *Rivera v. Marcus*, 533 F.Supp. 203 (D.Conn. 1982), a case which is factually indistinguishable from this one, the Court evaluated a foster care relationship in which the mother's half-sister had cared for the children, with the mother's consent, for over two years before the state became involved. For the same reasons which distinguish the case at bar from *OFFER*, *Keyees*, *Drummond*, and *Owens*, *supra*, the court held that the foster mother had a liberty interest in maintaining the integrity of her *de facto* nuclear family.

By granting certiorari to consider the petitioners' claims, this Court can determine the extent to which petitioners and other relatives like them have a liberty interest in maintaining the integrity of their *de facto* nuclear families. Although this issue was left undecided by *Smith v. OFFER* and *Moore v. City of East Cleveland*, *supra*, four lower federal courts and the Court of Appeals below have held or suggested that it should be decided in petitioners' favor. *See, Drollinger v. Milligan; Drummond v. Fulton County Department of Family & Children's Services; Keyees v. Tippecanoe County Department of Public Welfare; Sherrard v. Owens*, and *Rivera v. Marcus*, *supra*.

The Court's determination of this issue will also allow it to fully address the petitioners' claims that they were deprived of a fundamental liberty interest without due process of law. *Cf. Matthews v. Eldridge*, *supra*.

---

[18]The welfare department had this same expectation. In their letter of July 8th to the children's parents, respondents Brooks and McCord agreed that the children would remain with petitioners until the parents made other arrangements, which the parents never chose to do.

CONCLUSIONS

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RALPH OGDEN
M. ANNE WILCOX
Attorneys for the Petitioners

WILCOX, OGDEN & DUMOND
1122 Circle Tower Building
5 East Market Street
Indianapolis, Indiana 46204
317-635-8551